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In the Supreme Court of the United States

OCTOBER TERM, 1997

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT, ET AL., PETITIONERS

v.

JOHN H. MCBRYDE, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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This unusual mandamus proceeding arises out of a dispute among members of the Judicial Branch, acting in various official capacities, concerning the propriety of a purported reassignment of judicial responsibilities over two cases from one judge to another. Although the United States has a vital interest in the regular, lawful, and effective conduct of judicial business, not least in its capacity as the most frequent litigant before the federal courts, the particular matters at issue on the merits of this petition are preeminently ones of internal organization and management, under statutory guidance, within the

Judicial Branch. Those matters are unrelated to the substantive controversies among the litigants in the underlying proceedings out of which the judicial dispute arose; and although the United States was a party to one of those proceedings, *United States* v. *Satz*, No. 4:94-CR-094-A (N.D. Tex.), litigation of that case on the merits in the district court has now effectively concluded.[1] Indeed, although the United States filed a brief answer to Judge McBryde's mandamus petition in the court of appeals (taking no position on the merits, but urging denial of mandamus primarily on discretionary grounds), it is not clear whether the United States, as such, is actually a party to this mandamus proceeding.[2] Under these

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[1] The criminal convictions entered in *Satz* have been affirmed on appeal, and this Court has denied associated petitions for review. See *United States* v. *Gray*, 105 F.3d 956 (5th Cir. 1996), cert. denied, 117 S. Ct. 1326, 1856 and 2530 (1997).

[2] The United States was not named as a party to Judge McBryde's mandamus petition, although two U.S. Attorneys, their respective Offices, an Assistant Attorney General, and other federal employees were listed as "interested parties" in accordance with a local rule of court. Pet. for Mandamus 1-3. Fed. R. App. P. 21(a) specifies that when a petition seeks mandamus "directed to a court," "[a]ll parties to the proceeding in the trial court other than the petitioner are respondents for all purposes." On its face, however, Judge McBryde's petition sought mandamus directed, not to a court, but to the Chief Judge of the district court (in that capacity) and to the Judicial Council. See Pet. for Mandamus Cover, 9, 11, 13, 39. The court of appeals concluded that it lacked jurisdiction to issue such a writ to the Council in this case (Pet. App. 31a), but that it had jurisdiction to issue the writ to Chief Judge Buchmeyer, in his capacity as an "officer[ ] of the Northern District of Texas" (*id.* at 33a-36a).

The listing of counsel in connection with the reported opinion of the court of appeals incorrectly identifies Justice Department attorneys as counsel for Chief Judge Buchmeyer and

circumstances, we are reluctant to offer extensive uninvited comment, at the petition stage, on a controversy largely internal to a coordinate Branch of the government.

There is, however, one unique procedural issue that arises at this stage of the proceedings and that necessarily involves not only the Executive Branch, but this Office. The named petitioners in this Court are the Judicial Council of the Fifth Judicial Circuit and the Honorable Jerry Buchmeyer, in his official capacity as Chief Judge of the United States District Court for the Northern District of Texas. While the Judicial Council is an entity created by statute as an administrative arm of the Judicial Branch (see 28 U.S.C. 332), and the Chief Judgeship held by Judge Buchmeyer is a statutory office within that Branch (see 28 U.S.C. 136), both are clearly part of the government of the United States.

Section 518(a) of Title 28 of the United States Code provides that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." The Attorney General has in turn delegated that authority and responsibility for "[c]onducting, or assigning and supervising, all Supreme Court cases, including * * * petitions for * * * certiorari," to the Solicitor General, acting "in consultation with each agency or official concerned." 28 C.F.R. 0.20. Congress may, of course, override the general assignment of respon-

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other individual respondents to the mandamus petition. See *In re McBryde*, 117 F.3d 208, 209 (5th Cir. 1997). In fact, those attorneys appeared in the mandamus proceeding only on behalf of the United States as such.

sibility to the Solicitor General by specifically conferring on other governmental entities the authority to litigate in this Court. *United States* v. *Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988). This Court has made clear, however, that in the absence of such a specific statutory provision, the authority conferred by Section 518(a) to "conduct and argue" cases in this Court on behalf of federal governmental entities is exclusive as to any case "in which the United States is interested." *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 92-93 (1994); *Providence Journal*, 485 U.S. at 699-700.

In *Providence Journal*, this Court held that the United States was "interested," within the meaning of 28 U.S.C. 518(a), in a case in which a federal district court had appointed a private attorney to prosecute a criminal contempt, even though the matter was initiated at the direction of the district court and was "brought to vindicate the authority of the Judiciary and to punish disobedience of a court order." 485 U.S. at 707-708. The Court specifically rejected the argument, advanced by the Solicitor General, that Section 518(a) addressed only the question of authority to represent the interests of the Executive Branch. *Id.* at 701. Indeed, the Court found "somewhat startling" the proposition that, for these purposes, there could be "more than one 'United States' that may appear before this Court." *Ibid.*

Providence Journal calls into serious question petitioners' authority to bring their case to this Court without having received timely authorization from the Solicitor General.[3] Neither petitioner has

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[3] In *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970), the Solicitor General initially represented the

sought or received such authorization. Nor is there any evident ground to argue that Congress has conferred on either petitioner the sort of independent statutory authority that would be required to override Section 518(a) if it is otherwise applicable. See *Providence Journal*, 485 U.S. at 705 n.9; *FEC*, 513 U.S. at 93-98; compare 28 U.S.C. 332(d)(2) (authorizing a judicial council to institute a contempt proceeding in district court to enforce compliance with council orders).

This threshold jurisdictional issue may be a factor weighing against discretionary review in this case. If, however, the Court grants the petition for a writ of certiorari, it is respectfully submitted that the Court should request the parties to address the question whether petitioners may petition for certiorari without having received authorization from the Solicitor General.

BARBARA D. UNDERWOOD
Acting Solicitor General[*]

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Judicial Council in responding to Judge Chandler's filings in this Court (see *id.* at 79, 81), but when the case was briefed and argued on the merits, the Judicial Council was represented by private counsel and the Solicitor General filed a brief on behalf of the United States as amicus curiae supporting the Council (see *id.* at 75). In that amicus brief (at 1 n.*), the Solicitor General explained that he "ha[d] determined, pursuant to 28 U.S.C. 516 and 518 (Supp. IV), that since federal officers are both the petitioner and the respondent in this case, the United States should appear as *amicus curiae*, not as counsel for either party." The briefs do not disclose whether Judge Chandler received more specific authorization from the Solicitor General to file his mandamus petition.

[*] The Solicitor General is disqualified in this case.